

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:) Chapter 13 Case
) Number 92-10303

HOSEY DUKES)
RUBY DUKES)

Debtors)

_____)

HOSEY DUKES) at 4 O'clock & 21 min. P.M.
RUBY DUKES) Date: 9-9-92

Movants)

vs.)

CHEMICAL BANK, N.A., TRUSTEE)
FOR GOLDOME CREDIT CORP.)
HOME EQUITY TRUST)

Respondent)

_____)

IN RE:) Chapter 13 Case
) Number 92-10029

CHARLES McGRUDER)
EMMA McGRUDER)

Debtors)

_____)

CHARLES McGRUDER)
EMMA McGRUDER)

Movants)

vs.)

RESOLUTION TRUST CORP AS)
CONSERVATOR FOR YORKWOOD FEDERAL)
SAVINGS AND LOAN ASSOCIATION)

Respondent)

ORDER

This order consolidates two matters pending before the court in connection with hearings on objections to claims in the above Chapter 13 cases,

which objections raise the same legal issue. Based on the evidence presented at the respective hearings and relevant legal authorities I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Concerning Chapter 13 case No. 92-10303, on August 25, 1989, Mortgage Lenders, Inc. loaned Hosey and Ruby Dukes Sixteen Thousand Two Hundred and No/100 (\$16,200.00) Dollars. The Dukes executed a note in favor of the lender, promising to repay the loan in monthly installments of Two Hundred Sixty-Six and 74/100 (\$266.74) Dollars with interest at the rate of 18.5% per annum, secured by a deed to secure debt. Mortgage Lenders, Inc. assigned the note to Goldome Credit Corp. ("Goldome") on August 30, 1989. On March 1, 1990 Goldome assigned the note to Chemical Bank, N.A. ("Chemical Bank") as trustee for the Goldome Credit Corp. Home Equity Trust 1990-1.

The Dukes filed a joint Chapter 13 bankruptcy petition on February 14, 1992. Chemical Bank timely filed a proof of secured claim in the amount of Sixteen Thousand One Hundred Thirty-Two and 76/100 (\$16,132.76) Dollars. Debtors objected to Chemical Bank's proof of claim contending the underlying loan is usurious under

Official Code of Georgia Annotated (O.C.G.A.) 7-14-18, Georgia's Criminal Usury Statute.¹ Chemical Bank contends the loan complies with Georgia law.

In connection with Chapter 13 case No. 92-10029, on December 4, 1989

¹At hearing on the Dukes' objection to claim, an issue was raised as to whether Chemical Bank is the true holder of the claim at issue because the only supporting documentation submitted with the original proof of claim in the Dukes' case (claim No. 9) indicates that Goldome is the holder of the claim. Following the hearing, Chemical Bank filed an amended proof of claim with supporting documentation that evidences an assignment of the underlying note from Goldome to Chemical Bank. No objection was filed by the debtors with respect to the amended proof of claim.

Mortgage Lenders, Inc. loaned the McGruders Twenty Thousand and No/100 (\$20,000.00) Dollars. The McGruders executed a note in favor of the lender promising to repay the loan in monthly installments of Three Hundred Fourteen and 92/100 (\$314.92) Dollars with interest at the rate of 17.5% per annum, secured by a deed to secure debt. It is undisputed that Resolution Trust Corp. ("RTC"), as conservator for Yorkwood Federal Savings, by assignment is the current holder of the McGruder note.

On January 3, 1992 the McGruders filed a joint Chapter 13 petition. RTC timely filed a proof of secured claim in the amount of Twenty Thousand and No/100 (\$20,000.00) Dollars. Debtors objected to RTC's proof of claim, contending the underlying loan is usurious under O.C.G.A. §7-4-18.

CONCLUSIONS OF LAW

O.C.G.A. §7-5-18(a) provides in pertinent part as follows: "Any person, company, or corporation who shall . . . charge . . . any rate of interest greater than 5 percent per month, either directly or indirectly, by way of . . . any contract, contrivance, or device whatsoever shall be guilty" The debtors in these two Chapter 13 cases do not contend that the average monthly interest charges on their loans exceed 5%, but cite two previous decisions of this court where I held, relying on the authority of Moore v. Comfed Savings Bank, 777 F.Supp. 960 (S.D. Ga. 1991) (Bowen, J.), that

[w]here the loan terms include . . . an additional interest charge as defined under O.C.G.A. 7-4-18 which attaches upon the signing of the note and is nonrebatable upon early pay off or default, the [analysis for determining whether the loan violates O.C.G.A. 7-4-18] is not on a per annum basis; rather the analysis is monthly to determine whether in any given month, the interest charged exceeds

In re: Evans, 130 B.R. 357, 360-61 (Bankr. S.D. Ga. 1991) (emphasis added).

Accord, In re: Dent, 130 B.R. 623, 626 (Bankr. S.D. Ga.

1991) .

The debtors contend their respective loans violate O.C.G.A. §7-4-18 because of

additional interest charges which, according to the debtors, accrued at the inception of the loans, causing the total interest charged in the first month of the loans to exceed 5%. It is not necessary for me to apply the analysis in Evans and Dent to

the facts of these cases because, as explained in Wright v. Transamerica Financial Services, Inc. (In re: Wright), Chapter 13 case No. 91-11576 WL_____ (Bankr. S.D. Ga. Dalis, J. March 12, 1992), I am bound to follow the most recent expression of the District Court in this district, Johnson v. Fleet Finance, Inc., 785 F. Supp. 1003 (S.D.Ga. 1992) (Edenfield, C. J.), on this issue. In Johnson, Judge Edenfield held that "Georgia's criminal usury statute [O.C.G.A. §7-4-18] is violated only if a lender charges more than 5% interest per month, as calculated by amortizing all interest charges over the potential life of the loan." Johnson, supra, slip op. at 15 (emphasis added).

The debtors in each of these Chapter 13 cases argue that rather than being bound to the Johnson decision, I am bound to a decision by the Eleventh Circuit Court of Appeals, Moore v. Comfed Savings Bank, 908 F.2d 834 (11th Cir. 1990). There the Eleventh Circuit affirmed the district court's denial of a motion for summary judgment filed by defendant banking institutions, which defendants had acquired loans alleged by class action plaintiffs to be in violation of O.C.G.A. 7-4-18. The Eleventh Circuit in Moore did not resolve the issue of "whether under O.C.G.A. §7-4-18 a nonrebatable loan fee, or similar charge, is interest applicable exclusively to the period from the date of the execution of the loan to the date the first payment is-due." Wright, supra, slip op. at 4. The court only held that the defendants failed to carry the

burden of proof on their motion for summary judgment that there were no genuine factual issue left for trial. The Moore case at the circuit level did not decide the issue presented by these objections to claim. Although my view of the proper

interpretation of O.C.G.A. §7-4-18 has not changed, for the reasons stated in Wright, supra, I am bound to follow the Johnson decision. The debtors do not contend in either of these Chapter 13 cases that the total interest charged on the respective loans exceeds an average of 5% per month as computed by taking the aggregate of all interest charged over the life of the loan and dividing by the number of months in the loan term. Therefore, these loans, according to Johnson, do not violate O.C.G.A. §7-4-18.

It is therefore ORDERED that the objection to the claim of Chemical Bank, N.A., trustee for Goldome Credit Corp. is overruled;

further ORDERED that the objection to the claim of Resolution Trust Corp. as Conservator for Yorkwood Federal Savings and Loan Association is overruled.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 9th day of September, 1992.